

N. 3020

No. 15369

United States
Court of Appeals
for the Ninth Circuit

UTILITY APPLIANCE CORPORATION, a Corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court
of the United States

FILED

FEB 27 1957

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

GEORGE T. ALTMAN,
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Beverly Hills, Calif.,
For the Petitioner.

CHARLES K. RICE,
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LEE A. JACKSON,
Attorney, Dept. of Justice,
Department of Justice,
Washington 25, D. C.,
For the Respondent.

The Tax Court of the United States

Docket No. 45914

UTILITY APPLIANCE CORPORATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1952

Dec. 12—Petition received and filed. Taxpayer notified. Fee paid.

Dec. 22—Copy of petition served on General Counsel with exhibits attached.

1953

Feb. 17—Answer filed by General Counsel.

Feb. 17—Request for hearing in Los Angeles filed by General Counsel.

Feb. 19—Notice issued placing proceeding on Los Angeles Calendar. Service of answer and request made.

1954

Jan. 21—Motion to amend petition embodying amendment filed by taxpayer. 1/22/54, granted.

Jan. 25—Copy of motion to amend petition served on General Counsel.

Mar. 24—Answer to amendment to petition filed by General Counsel. 3/25/54, copy served.

Aug. 10—Hearing set December 6, 1954, Los Angeles, Calif.

Oct. 26—Notice cancelling hearing.

1955

Sept. 6—Joint motion to submit proceeding under Rule 30 filed.

Sept. 6—Stipulation of Facts filed.

Sept. 9—Order that proceeding be assigned to Judge Kern, Div. 16, for disposition, Petitioner's brief, 10/15/55; respondent's brief, 12/15/55; petitioner's reply brief, 1/15/56, entered.

Oct. 14—Brief filed by taxpayer. Copy served.

Dec. 15—Answer brief filed by respondent. Served 12/16/55.

1956

Jan. 13—Reply brief filed by taxpayer. 1/13/56, copy served.

Apr. 9—Supplementary brief filed by petitioner.

May 31—Opinion filed, Judge Kern, Div. 16. Decision will be entered under Rule 50. Served 6/1/56.

July 13—Agreed computation for entry of decision filed.

July 26—Decision entered, Judge Kern, Div. 16.

Oct. 19—Petition for review by U. S. Court of Appeals, Ninth Circuit, filed by petitioner.

Oct. 19—Notice of filing petition for review with proof of service thereon filed by petitioner.

Oct. 19—Designation of Contents of Record on review filed by petitioner.

Oct. 19—Notice of filing designation of contents of record on review with proof of service thereon filed by petitioner.

The Tax Court of the United States

Docket No. 45914

UTILITY APPLIANCE CORPORATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, Bureau symbols LA:IT:90D:CTF, dated October 8, 1952, and his partial rejection therein of applications for relief under section 722 of the Internal Revenue Code, and as a basis for this proceeding alleges as follows:

1. The petitioner is a corporation organized under the laws of the State of California with mailing address at 141 South El Camino Drive, Beverly Hills, California. The returns for the periods herein

involved were filed with the Collector for the Sixth District of California.

2. The notice of deficiency, a copy of which is attached hereto and marked Exhibit "A," was mailed to the petitioner on October 8, 1952. The dates of filing of the respective applications for relief under section 722 are given in the said notice of deficiency. Copies of said applications for the years 1943 and 1944 are attached hereto and marked Exhibits "B" and "C," respectively. The reason for not attaching copies of the applications for prior years is shown in paragraph 3 below.

3. After submission of data to the Commissioner, a settlement was reached. By virtue of said settlement, the only taxable year open before this Court is 1944, and as to said year the only question open before this Court is whether or not a constructive average base period net income for either or both of the years 1943 and 1945 in the amount agreed upon with the Commissioner, being the amount of \$65,000.00 for each year as set forth in Exhibit "A" attached hereto, may be employed for the purpose of computing the unused excess profits credit carry-back from 1945 to 1944. If such constructive average base period net income for both of said years is so employed, there would result for 1944 an overassessment of excess profits tax in the amount of \$32,454.46, and a deficiency in income tax of \$17,699.88, instead of the amounts of \$10,729.31 and \$7,536.08, respectively, shown in the deficiency notice, Exhibit "A" attached hereto. It results that the

taxes involved in this controversy are excess profits taxes for 1944 in the sum of \$21,725.15, subject to offset by additional income taxes for the same year the amount of which, if petitioner is sustained as to the full sum, will be \$10,163.80.

4. The determination of taxes set forth in the said notice of deficiency is based upon the following errors:

(a) Failure to hold that the applications for relief filed were timely in respect to the computation of an unused excess profits credit adjustment for 1944 on the basis of employment of a constructive average base period net income for the year 1943.

(b) Failure to hold that the applications for relief filed were timely in respect to the computation of an unused excess profits credit adjustment for 1944 on the basis of employment of a constructive average base period net income for the year 1945.

5. The facts upon which petitioner relies as a basis of this proceeding are as follows:

(a) The revenue agent's report for the years 1942 to 1945, inclusive, rendered under date of June 10, 1947, contains an allowance of an unused excess profits credit adjustment for 1944 consisting of an unused excess profits carry-back from 1945. The pertinent pages of said report, being pages 33 and 34, are attached hereto as Exhibit "D."

(b) The application forms provided by the Treasury Department, Form 991, do not require a

computation of the tax computed after application of Section 722. The amount so computed is required to be entered on page 1, line 7, but nowhere does the form, including the instructions attached thereto, require a showing as to how the amount was computed.

(c) Nowhere on its application for relief under Section 722 filed for 1944 did petitioner show how it computed the amount of excess profits tax after application of Section 722. Petitioner, in accordance with the form, merely entered such amount on page 1, line 7, thereof; and the amount there shown, \$131,071.33, is less than the amount now claimed by petitioner in this petition. Likewise, the amount of refund or credit for which said application was a claim, \$43,081.70, as shown on page 1, line 15 thereof, is greater than the refund now claimed by petitioner in this petition.

(d) On January 16, 1948, there was assessed for 1944 additional excess profits tax in the amount of \$31,658.68, plus interest in the amount of \$2,462.58, or a total of \$34,121.26. The said total was paid as follows:

October 11, 1948.....	\$ 9,534.36
November 10, 1948.....	11,054.18
January 25, 1949.....	7,500.00
February 14, 1949.....	6,032.72

Additional interest of \$1,762.12 was also paid on February 14, 1949.

(e) On September 8, 1950, the Treasury Department issued its Revenue Agent's Report covering the issues raised under section 722, wherein on page 1 it made the following statement:

“(e) The taxpayer originally paid excess profits tax and filed Form 991 for 1943, but subsequently all the excess profits tax paid was refunded because of a net operating loss and unused excess profits credit carry-back from 1945, so that Form 991 is ineffective. No timely amended Form 991 or Form 843 claim has been filed for other years claiming an unused excess profits credit carry-over or carry-back from 1943 based on a CABPNI, as required by the regulations, so no CABPNI is recommended for 1943 for the purpose of a carry-over or carry-back.”

(f) On September 20, 1950, petitioner, by its attorney, George T. Altman, filed with the Excess Profits Tax Council at Washington, D. C., a protest, bearing date of September 13, 1950, to the conclusions reached in the said Revenue Agent's Report. Among other statements contained in said protest is the following on the last page thereof:

“Taxpayer also contends that reconstruction should be allowed for 1943 for unused excess profits credit carry-back and carry-over purposes.”

(g) No reference was made in the said protest to a reconstruction for 1945 only because no such

reconstruction was mentioned in the said Revenue Agent's Report, and not because there was any intention to request a reconstruction for 1943 but not for 1945. On May 7, 1951, petitioner, through its attorney, George T. Altman, filed a letter with the Excess Profits Tax Council, the said letter being verbatim as follows:

“It appears from the record that the applications filed in this proceeding cover only the years 1940-1944, inclusive. Since there was no tax for 1945, no claim was filed for that year.

“We should like to ask now that a constructive average base period net income be determined for 1945 for such application in respect of taxes for years prior to 1945 as the taxpayer may be entitled to upon the record.

“I believe that such a determination should be made as a matter of course because of the carry-back to 1943 and 1944. See revenue agents' reports respecting standard issues. The carry-back has also been a matter of discussion in conferences with the office of the Internal Revenue Agent in Charge and with the Technical Staff. See letter dated December 3, 1948, from the Internal Revenue Agent in Charge to the taxpayer.

“This request is made, nevertheless, for the purpose of making it an express part of the record.”

(h) In the said letter dated December 3, 1948, the Internal Revenue Agent in Charge explained that further information was necessary to sustain the petitioner's claims and in that connection pointed out that the excess profits tax paid for the year 1943 had been refunded, due "to a net operating loss and unused excess profits credit carry-back from 1945."

(i) In all discussions and conferences had by petitioner with the offices of the Commissioner, both before and after March 15, 1949, in regard to its various applications for relief, including that for 1944, carry-over and carry-back factors were always taken into consideration. More specifically, various amounts of constructive average base period net income were discussed as a basis of settlement, and in estimating, in the course of said discussions, the reduction in tax resulting, carry-over and carry-back factors were always given effect.

(j) Long prior to the expiration of the period of limitations under section 322 of the Internal Revenue Code the Commissioner was on actual notice that petitioner's understanding of its application for relief was that carry-over and carry-back provisions would be automatically applied in any year in which any tax reduction would result therefrom.

Wherefore petitioner prays that this Court may hear the proceeding and determine that petitioner is entitled to a carry-back of unused excess profits

credit from the year 1945 to the year 1944, based upon a constructive average base period net income for the years 1943 and 1945.

/s/ GEORGE T. ALTMAN,
Counsel for Petitioner.

EXHIBIT "A"

Oct. 8, 1952.

LA:IT:90D:CTF

Utility Appliance Corp.
(Formerly Utility Fan Corporation)
141 South El Camino Boulevard
Beverly Hills, California

Gentlemen:

You are advised that the determination of your excess profits tax liability for the taxable years ended December 31, 1940, 1941, 1942, 1943 and 1944, discloses an overassessment of \$36,736.81, and that the determination of your income tax liability for the taxable years ended December 31, 1941, 1942 and 1944 discloses a deficiency of \$17,961.47, as shown in the statement attached.

In making this determination careful consideration has been given to your applications for relief (Forms 991) under section 722 of the Internal Revenue Code filed on September 13, 1943 for the taxable years ended December 31, 1940, 1941 and 1942,

and on May 15, 1945, for the taxable years ended December 31, 1943 and 1944. The relief requested has been allowed in part inasmuch as it has been determined that a constructive average base period net income is allowable in the amount of \$39,000.00 for the taxable year ended December 31, 1940, in the amount of \$65,000.00 for each of the taxable years ended December 31, 1941, 1942 and 1944, and in the amount of \$65,000.00 for each of the taxable years ended December 31, 1943 and 1945, for the purpose of computing unused excess profits credit carry-back and carry-over.

In accordance with the provisions of sections 272 and 732 of the Internal Revenue Code, notice is hereby given of the deficiency mentioned and of the disallowance of the claim for refund asserted in your application for relief (Form 991) for the taxable year ended December 31, 1943, and of the disallowance in part of the claims for refund asserted in your applications for relief (Forms 991) for the taxable years ended December 31, 1940, 1941, 1942 and 1944, and in the related claims for refund (Forms 843) filed on October 26, 1948, for the taxable year ended December 31, 1941, and on February 28, 1949, for the taxable years ended December 31, 1942 and 1944.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States at its principal address, Washington 4, D. C., for a redetermination of your tax liability. In counting the 90 days you may not

exclude any day unless the 90th day is a Saturday, Sunday or legal holiday in the District of Columbia, in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays and legal holidays are to be computed in computing the 90-day period.

Very truly yours,

JOHN B. DUNLAP,
Commissioner.

By /s/ GEORGE D. MARTIN,
Internal Revenue Agent
in Charge.

CTF:vmc

Enclosures:

Statement
Form 1276

Statement

LA:IT:90D:CTF

Utility Appliance Corp.
(Formerly Utility Fan Corporation)
141 South El Camino Boulevard
Beverly Hills, California

Tax Liability for the Taxable Years Ended
December 31, 1940, 1941, 1942, 1943, and 1944

Excess Profits Tax

Year	Liability	Assessed	Over-assessment	Deficiency
1940	\$ 3,324.19	\$ 3,897.45	\$ 573.26	None
1941	27,060.39	35,538.47	8,478.08	None
1942	33,329.46	50,285.62	16,956.16	None
1943	None	None	None	None
1944	172,577.90	183,307.21	10,729.31	None
Totals	\$236,291.94	\$273,028.75	\$36,736.81	None

Income Tax

Year	Liability	Assessed	Over-assessment	Deficiency
1941	\$ 34,156.05	\$ 31,527.84	None	\$ 2,628.21
1942	26,732.70	18,935.52	None	7,797.18
1944	33,784.94	26,248.86	None	7,536.08
Totals	\$ 94,673.69	\$ 76,712.22	None	\$17,961.47

In making this determination of your tax liability careful consideration has been given to your applications for relief (Form 991) under section 722 of the Internal Revenue Code, as follows:

Year Ended	Filed on
December 31, 1940.....	September 13, 1943
December 31, 1941.....	September 13, 1943
December 31, 1942.....	September 13, 1943
December 31, 1943.....	May 15, 1945
December 31, 1944.....	May 15, 1945

and to the following related claims (Form 843) :

Year Ended	Filed on
December 31, 1941.....	October 26, 1948
December 31, 1942.....	February 28, 1949
December 31, 1944.....	February 28, 1949

The relief requested has been allowed in part inasmuch as it has been determined that a constructive average base period net income is allowable in the amount of \$39,000.00 for the taxable year ended December 31, 1940, and in the amount of \$65,000.00 for each of the taxable years ended December 31, 1941, 1942, and 1944. It is noted that you have executed an agreement to such amounts of constructive average base period net income.

Inasmuch as it has been previously determined that no excess profits tax liability exists for the taxable year ended December 31, 1943, your application for relief for that taxable year is rejected.

There has been determined a constructive average base period net income in the amount of \$65,000.00 for each of the taxable years ended December 31, 1943, and December 31, 1945, for the purpose only of computing unused excess profits credit carry-

over and carry-back to the extent applicable. However, it is held that no timely claim for refund has been filed for the purpose of using the constructive average base period net income in the computation of the unused excess profits credit carry-over or carry-back from either of such years.

The income tax net income and excess profits net income shown herein are the same amounts as shown by reports of examination dated January 29, 1945, and April 21, 1947, copies of which were sent you, and to which you have indicated your agreement.

A copy of this letter and statement has been mailed to your representative, Mr. George T. Altman, 233 South Beverly Drive, Beverly Hills, California, in accordance with the authorization contained in the power of attorney executed by you.

Duly verified.

Received and Filed December 12, 1952, T.C.U.S.

Served December 22, 1952.

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, Charles W. Davis, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits, denies and alleges as follows:

1. Admits the allegations contained in paragraph 1 of the petition.
2. Admits the allegations contained in the first two sentences of paragraph 2 of the petition; denies the remaining allegations contained in said paragraph.

3. Admits that the taxes in controversy are excess profits taxes for 1944, subject to offset by additional income taxes for the same year, in the amounts as alleged in paragraph 3 of the petition; denies the remaining allegations contained in paragraph 3 of the petition.

4(a) and (b). Denies the allegations of error contained in subparagraphs (a) and (b) of paragraph 4 of the petition.

5(a). Admits that respondent allowed an unused excess profits credit adjustment for 1944 consisting of an unused excess profits carry-back from 1945 based upon invested capital; denies the remaining allegations contained in subparagraph (a) of paragraph 5 of the petition.

(b) and (c). Denies the allegations contained in subparagraphs (b) and (c) of paragraph 5 of the petition.

(d). Admits the allegations contained in the first sentence of subparagraph (d) of paragraph 5 of the petition; for lack of sufficient information presently available, denies the remaining allegations contained in said subparagraph.

(e) to (j) inclusive. Denies the allegations contained in subparagraphs (e) to (j) inclusive, of paragraph 5 of the petition.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

7. Further answering and in the alternative, in the event that respondent's determination with respect to the unused excess profits credit carry-back from the taxable year 1945 to the taxable year 1944 should not be sustained there would result an increase in the income subject to normal tax and surtax, and an increased deficiency in income tax for the taxable year 1944 of \$10,163.80, i.e., from \$7,536.08, as determined in the notice of deficiency, to \$17,699.88, as alleged in paragraph 3 of the petition. Claim for this increased deficiency in income tax is hereby made.

Wherefore, it is prayed that the Commissioner's determination be approved; and in the alternative, in the event that said determination is not approved respondent prays that the Court redetermine the deficiency in income tax for the taxable year 1944 to be in the amount determined by the Commissioner, plus an increased deficiency resulting from the redetermination by the Court with respect to income subject to excess profits tax, claim for which increased deficiency is hereby made pursuant to the provisions of Section 272(e) of the Internal Revenue Code.

/s/ CHARLES W. DAVIS, E.C.C.
Chief Counsel,
Bur. of Internal Revenue.

Of Counsel:

B. H. NEBLETT,
District Counsel;

E. C. CROUTER,
Appellate Counsel;

R. B. SULLIVAN,
Special Attorney,
Bur. of Internal Revenue.

Received and filed February 17, 1953, T.C.U.S.

[Title of Tax Court and Cause.]

MOTION TO AMEND PETITION
EMBODYING AMENDMENT

Petitioner now moves the Court for leave to amend the petition herein, and to treat the petition as so amended, as follows:

1. To correct the last two sentences of paragraph 3 thereof to read: "If such constructive average base period net income for both of said years is so employed, there would result for 1944 an overassessment of excess profits tax in the amount of \$44,674.80, and a deficiency in income tax of \$23,417.00, instead of the amounts of \$10,729.31 and \$7,536.08, respectively, shown in the deficiency notice, Exhibit "A" attached hereto. It results that the taxes involved in this controversy are excess profits taxes for 1944 in the sum of \$33,945.49, subject to offset by additional income taxes for the same year the amount of which, if petitioner is sustained as to the full sum, will be \$15,880.92."

2. To add the following to paragraph 5:

(k) In arriving at the figure of \$10,884.69 which appears on page 5 of the deficiency notice as "Unused excess profits credit adjustment" allowed for the taxable year ended December 31, 1944, the Commissioner determined the excess profits net income for 1943 to be \$87,205.79; and in determining the said amount of excess profits net income he increased the excess profits net income otherwise computed by the amount of \$14,292.80 as being 50% of the interest deduction for 1945. The said amount of \$14,292.80, representing an adjustment of the net operating loss for 1945, resulted from the use of the invested capital method in determining the excess profits credit for 1945.

(1) The letter dated May 7, 1951, referred to in paragraph 5 (g) above was acknowledged in writing by the Commissioner on May 8, 1951, the case then being still under consideration on the merits by the Commissioner. Several conferences and considerable correspondence with the office of the Commissioner relating to the merits of the case occurred after said date and before the Commissioner's final determination. A settlement of the amount of the constructive average base net income for all taxable years was agreed to by the petitioner on July 2, 1952, and the Commissioner's determination of such constructive average base period net income was made on September 19, 1952. Subsequent to the filing of the petition herein petitioner filed an "Amendment of claim" on Form 843 to formalize,

if necessary, the written though informal contentions and claims quoted in paragraphs 5 (f) and 5 (g) above.

Reason for Motion

The purpose of this amendment is to eliminate errors of computation which were made in arriving at the figures shown in paragraph 3 of the petition; to put into the record figures necessary for any re-computation of tax; and to add to the petition certain additional specifications of fact.

/s/ GEORGE T. ALTMAN,
Counsel for Petitioner.

Received and filed January 21, 1954, T.C.U.S.

Granted January 22, 1954, John W. Kern, Judge.

Served January 25, 1954.

[Title of Tax Court and Cause.]

ANSWER TO AMENDMENT TO PETITION

The Commissioner of Internal Revenue, by his attorney, Daniel A. Taylor, Chief Counsel, Internal Revenue Service, for answer to the amendment to petition of the above-named taxpayer, admits, denies and alleges as follows:

1. Admits that the taxes in controversy are excess profits taxes for 1944, subject to offset by ad-

ditional income taxes for the same year. Denies the remaining allegations in paragraph 1 of the amendment and in paragraph 3 of the petition as amended.

2. Denies the allegations in paragraph 2 of the amendment and each subparagraph thereof, and in subparagraphs (k) and (l) of paragraph 5 of the petition as amended.

3. Denies each and every allegation contained in the amendment to the petition not hereinbefore specifically admitted, qualified or denied.

4. Further answering and in the alternative, in the event that respondent's determination with respect to the unused excess profits credit carry-back from the taxable year 1945 to the taxable year 1944 should not be sustained there would result an increased deficiency in income tax for the taxable year 1944. Claim for this increased deficiency in income tax is hereby made.

Wherefore, it is prayed that the Commissioner's determination be approved; and in the alternative, in the event that said determination is not approved respondent prays that the Court redetermine the deficiency in income tax for the taxable year 1944 to be in the amount determined by the Commissioner, plus an increased deficiency resulting from the redetermination by the Court with respect to income subject to excess profits tax, claim for which increased deficiency is hereby made pursuant to the

provisions of Section 272(e) of the Internal Revenue Code.

/s/ DANIEL A. TAYLOR, R.E.M.
Chief Counsel, Internal
Revenue Service.

Filed March 24, 1954, T.C.U.S.

Served March 25, 1954.

[Title of Tax Court and Cause.]

OPINION

Petitioner filed a claim for relief under section 722 for the year 1944. In that claim no reference was made to any carry-back of unused excess profits credit from 1945. A tentative carry-back of such credit was allowed but was not computed on any constructive average base period net income for 1945. After the time prescribed by section 322 (b) (6) petitioner claimed such carry-back as so computed. Thereafter the parties agreed on the constructive average base period net income of petitioner for 1944 and 1945. Held, petitioner had filed no timely claim for a carry-back to 1944 of unused excess profits credit from 1945 computed on the constructive average base period net income for that year.

GEORGE T. ALTMAN, ESQ.,

For the Petitioner.

R. E. MAIDEN, JR., ESQ.,

For the Respondent.

Opinion

Kern, Judge:

In this case, submitted under Rule 30, it is stipulated that "the sole issue is whether petitioner has a timely claim for an unused excess profits credit arising from the use of a constructive average base period net income for carry-back purposes, so that a constructive average base period net income for the year 1945 may be employed for the purpose of computing the unused excess profits credit carry-back from 1945 to 1944."

Petitioner is a corporation organized under the laws of the State of California. It filed its returns for the periods here involved with the collector for the sixth district of California.

The only year before this Court is 1944. It is stipulated that if the Court holds that the constructive average base period net income for the year 1945 may be employed in the computation of unused excess profits carry-back from 1945 to 1944, the amount of such income is \$65,000.

Petitioner had no excess profits net income for the year 1945, but had a deficit in such net income. Its excess profits credit for that year, computed without regard to section 722, was \$43,435.34 as computed under section 713, and \$55,180.66 as computed under section 714.

In the deficiency notice the Commissioner allowed an unused excess profits credit adjustment for the year 1944 in the amount of \$10,884.69. That amount

was computed without regard to section 722, as follows:

Unused excess profits credit for 1945	\$55,180.66
Portion thereof first applied to 1943	44,295.97
<hr/>	
Balance being unused excess profits credit carry-back to 1944.....	\$10,884.69

The foregoing computation appears in a revenue agent's report dated June 10, 1947. The correct amount to be first applied to 1943, as now agreed to by the Commissioner, is \$11,162.99 instead of the amount of \$44,295.97.

The Commissioner allowed to petitioner under section 722 (b) (4), a constructive average base period net income of \$39,000 for the year 1940, and \$65,000 for each of the years 1941, 1942 and 1944. The Commissioner has also now agreed to the employment of a like constructive average base period net income, \$65,000, for the year 1943. The amount of \$11,162.99, stipulated as the amount of excess profits credit carry-back from 1945 to be applied first to the year 1943, is computed as follows:

Excess profits net income, 1943 per return	\$ 98,170.66
Adjustments per revenue agent's report:	
Add: Declared value excess-profits tax overassessment..	3,841.03
<hr/>	
Total	\$102,011.69
Deduct: net income adjustment	29,098.70
<hr/>	

Excess profits net income, 1943, as so adjusted	\$ 72,912.99
Deduct: 95% of \$65,000, con- structive average base period net income for 1943.....	61,750.00

Balance, being amount of unused excess profits credit for 1945 to be applied first to 1943 (whether the total amount of such credit for 1945 is computed with or without the use of a constructive average base period net income) \$ 11,162.99

Petitioner filed its excess profits tax return for the year 1944 on May 15, 1945, pursuant to extension granted by the Commissioner to such date. The following payments of tax were made by petitioner on the dates indicated for excess profits tax liability for the year 1944:

Original:

Paid 3/15/45	\$ 36,649.00
5/15/45	6,497.03
6/15/45	43,081.70
9/17/45	43,081.70
12/17/45	43,081.70
	<hr/>
Total	\$172,391.13
Less: Interest	64.33
	<hr/>
Tax paid	\$172,326.80

Additional:

Paid 10/11/48	\$ 9,534.36	
11/10/48	11,054.18	
1/25/49	7,500.00	
2/14/49	7,794.84	
Total	\$ 35,883.38	
Less: Interest \$2,462.58.....		
" 1,762.12.....	4,224.70	
Tax Paid		31,658.68
Total tax paid.....		\$203,985.48
Less: Allowance on tentative carry- back claim 11/25/46.....		20,678.27
		\$183,307.21

On May 15, 1945, petitioner filed an application on Form 991, for excess profits tax relief for the year 1944. This application asked for a reduction in excess profits tax under section 722 in the amount of \$90,153.56, from \$221,224.89 to \$131,071.33, computed in each case prior to the 10 per cent credit for debt retirement. The application claimed a constructive average base period net income of \$161,058.71, computed under section 722 (b) (4). Details in support of the constructive average base period net income as claimed were incorporated in the application by reference from statements attached to Form 991 filed by petitioner for the year 1942. Nothing in the form required a schedule showing how the reduced tax claimed of \$131,071.33 was computed, and no such schedule was attached.

The reduced tax claimed of \$131,071.33 was computed in conformance with section 710 and 711 of the Internal Revenue Code of 1939, as follows:

Excess profits net income (income credit method)		\$300,975.60
Specific Exemption	\$ 10,000.00	
Constructive average base period net income claimed on Form 991.....	161,058.71	
Constructive excess profits credit based on constructive income is 95% of the claimed constructive average base period net income.....	153,005.77	163,005.77
		<hr/>
Adjusted excess profits net income after application of section 722 as claimed		\$137,969.83
		<hr/>
Excess profits tax at rate of 95%.....		\$131,071.33

The amount of excess profits tax paid by petitioner at or prior to the filing of its claim for relief for 1944 on Form 991, that is, at or prior to May 15, 1945, was \$43,081.70, and that amount was shown on Form 991 as the amount of refund or credit for which the application was a claim. Subsequently, on February 28, 1949, petitioner filed a claim on Form 843 to supplement the Form 991 and claimed a total refund of \$79,446.59. The claim filed on Form 843 comprehended a constructive average base period net income for 1944 of \$161,058.71, without claiming any carry-back of unused excess profits credit from 1945 based on a constructive average base period net income.

Both the application filed by petitioner on Form 991 on May 15, 1945, for the year 1944, and the

claim filed on Form 843 on February 28, 1949, for such year, comprehended a constructive average base period net income for 1944 of \$161,058.71, without claiming any carry-back of unused excess profits credit from 1945 computed either with or without regard to section 722.

No agreement was entered into by the petitioner and the respondent which would extend the statute of limitation for the year 1944 or 1945.

On December 3, 1948, the internal revenue agent in charge at Los Angeles wrote to petitioner *inter alia*, as follows:

Reference is made to your claims for excess profits tax relief under section 722 of the Internal Revenue Code, filed for the years ended December 31, 1940, 1941, 1942, 1943 and 1944.

In connection with these claims, it may be noted that the general average base period net income is \$29,836.74, whereas under the growth formula, provided in section 713 (f) of the Code, you are entitled to use \$45,168.23, excess profits net income for the year 1939 which is the highest income in base period years. Also, that excess profits tax paid for the year 1943 was refunded, due to a net operating loss and unused excess profits credit carry-back from 1945, and that in 1944 the 80% tax limitation is applicable.

The claims for relief have been carefully reviewed on the basis of information submitted

in connection with the claims, and there appears to be no possibility of a constructive average base period net income which would overcome the growth formula and the 80% limitation, in 1944, and result in the allowance of any relief.

As stated in this letter of December 3, 1948, an unused excess profits credit carry-back from 1945 to 1944 had already been allowed by the Commissioner, on the basis of issues other than section 722.

On May 7, 1951, petitioner, by its attorney, mailed a letter to the Excess Profits Tax Council, as follows:

It appears from the record that the applications filed in this proceeding cover only the years 1940-1944, inclusive. Since there was no tax for 1945 no claim was filed for that year.

We should like to ask now that a constructive average base period net income be determined for 1945 for such application in respect of taxes for years prior to 1945 as the taxpayer may be entitled to upon the record.

I believe that such a determination should be made as a matter of course because of the carry-back to 1943 and 1944. See revenue agent's reports respecting standard issues. The carry-back has also been a matter of discussion in conferences with the office of the Internal Revenue Agent in Charge and with the

Technical Staff. See letter dated December 3, 1948, from the Internal Revenue Agent in Charge to the taxpayer.

This request is made, nevertheless, for the purpose of making it an express part of the record.

On May 8, 1951, the Excess Profits Tax Council acknowledged receipt of this letter and replied to it as follows:

Receipt is acknowledged of your letter of May 7, 1951, concerning subject applications for section 722 relief. It is noted that this letter requests a determination of constructive average base period net income for 1945.

On the date of this letter, May 7, 1951, the applications for relief involved in this proceeding were pending on the merits before the said Excess Profits Tax Council. Several conferences and considerable correspondence with the office of the Commissioner relating to the merits of the case occurred after such date and before the Commissioner's final determination. A settlement of the amount of the constructive average base period net income for all taxable years, including 1945, was agreed to by the petitioner on July 2, 1952, and the Commissioner's determination of this constructive average base period net income was made on September 19, 1952.

On January 20, 1954, petitioner filed on Form 843 an "Amendment of Claim" relating to its claim for refund of excess profits tax for the year 1944

“solely for the purpose of making formal the claims previously presented requesting use in computing the unused excess profits credit adjustment for 1944, of a constructive average base period net income determined under section 722 for 1943 and 1945.* * *”

Provisions of the statute and regulations pertinent to the problem presented by this case are set out in the margin.¹

It is obvious from the facts stipulated that the letter of petitioner’s counsel dated May 7, 1951, if considered alone as an application equivalent to

¹Sec. 322. Refunds and Credits.

* * *

(b) Limitation on Allowance.

(1) Period of Limitation—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later.* * *

(6) Special Period of Limitation with Respect to Net Operating Loss Carry-backs and Unused excess Profits Credit Carry-backs—If the claim for credit or refund relates to an overpayment attributable to a net operating loss carry-back or to an unused excess profits credit carry-back, in lieu of the three-year period of limitation prescribed in paragraph (1), the period shall be that period which ends with the expiration of the fifteenth day of the thirty-ninth month following the end of the taxable year of the net operating loss or the unused excess profits credit which results in such carry-back, or the period prescribed in paragraph (3) in respect of such taxable years, whichever expires later. In the case of such a claim, the amount of the

that prescribed by the quoted regulations, was not filed within the time required under section 322 (b) (6). It is even more obvious that petitioner's "amendment of claim" filed January 20, 1954, was not in and of itself an application or claim filed within the prescribed time. That such an application or claim must be filed within the time prescribed by section 322 (b) (6) cannot be doubted. *Lockhart Creamery*, 17 T. C. 1123, 1140; *Barry-Wehmiller Machinery Co.*, 20 T. C. 705. Cf. *Packer Publishing Co.* 17 T. C. 882, 898.

credit or refund may exceed the portion of the tax paid within the period provided in paragraphs (2) or (3), whichever is applicable, to the extent of the amount of the overpayment attributable to such carry-back.

Sec. 722. General Relief—Constructive Average Base Period Net Income.

* * *

(d) Application for Relief Under This Section—* * * The benefits of this section shall not be allowed unless the taxpayer within the period of time prescribed by section 322 and subject to the limitation as to amount of credit or refund prescribed in such section makes application therefor in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. If a constructive average base period net income has been determined under the provisions of this section for any taxable years, the Commissioner may, by regulations approved by the Secretary, prescribe the extent to which the limitations prescribed by this subsection may be waived for the purpose of determining the tax under this subchapter for a subsequent taxable year.

However, petitioner contends that the application for relief filed by it on May 15, 1945, on Form 991 for the year 1944 was itself sufficient, since it was the form required by the regulations, that form required "no special or express statement in the case of an unused excess profits carry-back," the respondent knew that a tentative carry-back claim of unused excess profits credit for 1945, computed without regard to section 722 had already been allowed to it for 1944, the information necessary for the computation of a constructive average base period net income for 1945 was before respondent in statements attached to applications for relief under

Regulations 112.;

Sec. 35.722-5. Application for relief under section 722 (a)——

* * *

In order to obtain the benefits of an unused excess profits credit for any taxable year for which an application for relief on Form 991 (revised January, 1943) was not filed, using the excess profits credit based on a constructive average base period net income as an unused excess profits credit carry-over or carry-back, the taxpayer, except as otherwise provided in (d) of this section, must file an application on Form 991 (revised January, 1943) for the taxable year to which such unused excess profits credit carry-over or carry-back is to be applied within the period of time prescribed by section 322 for the filing of a claim for credit or refund for such latter taxable years. In addition to all other information required, such application shall contain a complete statement of the facts upon which it is based and which existed with respect to the taxable year for which the unused excess profits credit so computed is claimed to have arisen, and shall claim the benefit of the unused excess profits credit carry-over or carry-back.* * *

section 722 relating to prior years, but incorporated by reference in the application for 1944, and the implicit application for a tentative carry-back recognized by its allowance was sufficient even though it made no request for the employment of a constructive average base period net income for 1945 in computing the unused excess profits credit carry-back for that year available to petitioner for 1944.

In substance, it seems to us that similar arguments were made by the taxpayer in *St. Louis Amusement Co.*, 22 T.C. 522. The crucial fact is that no application or claim filed by petitioner within the period prescribed by section 322 (b) (6) asserted a claim for carry-back of unused excess profits credit from the year 1945 based upon constructive average base period net income for that year. Therefore, we conclude that the application for relief filed by petitioner on May 15, 1945, was not a claim for an unused excess profits credit arising under the use of a constructive average base period net income for carry-back purposes.

Petitioner contends that "even if the original claim filed was defective because it did not expressly request that the unused excess profits carry-back from 1945 be computed by employment of a CABPNI for 1945, such defect was cured by petitioner's letter of May 7, 1951, to the Excess Profits Tax Council." This contention is rejected on the authority of *St. Louis Amusement Co.*, *supra*.

Petitioner further contends that even though a timely claim was not filed, there was a waiver on

the part of respondent in that a determination of the constructive average base period net income of petitioner for 1945 was made by the Excess Profits Tax Council after the receipt of petitioner's letter of May 7, 1951. This contention of petitioner is rejected on the authority of *May Seed and Nursery Co.*, 24 T. C. 1131.

The issue presented to us for decision in this proceeding is decided in favor of respondent.

Reviewed by the Special Division.

Decision will be entered under Rule 50.

Filed May 31, 1956.

Served June 1, 1956.

Entered June 1, 1956.

The Tax Court of the United States
Washington

Docket No. 45914

UTILITY APPLIANCE CORPORATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the Findings of Fact and Opinion filed in the above-entitled proceeding on May 31,

1956, counsel for the parties filed, on July 13, 1956, an agreed recomputation of petitioner's tax liability. Now, therefore, it is

Ordered and Decided: that there is a deficiency in petitioner's income tax for the year 1944 in the amount of \$20,789.27; and that there is an overpayment in petitioner's excess profits tax for the year 1944 in the amount of \$39,058.02, which overpayment was made within two years before the application for relief. Section 322 (d), Internal Revenue Code of 1939.

[Seal] /s/ JOHN W. KERN,
 Judge.

Served July 26, 1956.

Entered July 26, 1956.

In the United States Court of Appeals
for the Ninth Circuit

T. C. Docket No. 45914

UTILITY APPLIANCE CORPORATION,
 Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,
 Respondent on Review.

PETITION FOR REVIEW

The above-named petitioner, by George T. Altman, attorney, hereby files its petition under the

provisions of section 1142 of the Internal Revenue Code of 1939 (as made effective by section 7851 (b) (1) of the Internal Revenue Code of 1954) for review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court of the United States entered July 26, 1956, determining an overassessment of excess profits taxes and a deficiency in income taxes for the year 1944 under the provisions of section 722 of the Internal Revenue Code of 1939, but holding as to a part of the relief applied for that it was barred by the statute of limitations. For the purpose of this review petitioner shows:

I.

Facts Relating to Venue

Petitioner is a California corporation and has its principal office in Beverly Hills, California. The returns for the years involved here were filed with the Collector of Internal Revenue for the Sixth District of California.

II.

Nature of Controversy

The controversy involves solely a question of the statute of limitations on applications for relief under I.R.C. 1939, section 722. Applications for relief were timely filed for the years 1940 to 1944, inclusive. None was filed for 1945 because of a net operating loss in that year. Also, the application for 1943 became moot because the excess profits tax paid for that year was refunded due to a net operat-

ing loss in 1945. That loss resulted in carry-backs to 1943 which eliminated any excess profits tax liability for that year. The carry-back of the 1945 unused excess profits credit, moreover, as computed without regard to section 722, was not all used up in 1943, so that there was, without regard to section 722, a carry-back of unused excess profits credit from 1945 to 1944. Thus section 722 could be given effect as to 1943 and 1945 only by way of increasing an already created carry-back of unused excess profits credit from 1945 to 1944.

The Commissioner, in his statutory notice relating to the applications under section 722, granted relief for all years in which excess profits tax had been paid and not previously refunded, that is, 1940, 1941, 1942 and 1944. He allowed a carry-back of unused excess profits credit from 1945 to 1944 but in computing that carry-back he refused to apply a constructive average base period net income computed under section 722 for 1943 and 1945. He based such refusal on the ground that no timely application in respect to 1943 and 1945 for carry-back purposes had been filed. He agreed, however, that the amount of such a constructive average base period net income would, if a timely application in respect thereto had been filed, be the same as for the years 1941, 1942, and 1944. 1940 was in a separate category because of the "variable credit rule" and the deduction in that year for income taxes.

In the petition filed in the Tax Court, petitioner assigned two errors, one as to the Commissioner's refusal to use a constructive average base period

net income for 1943 and the other as to his refusal to use a constructive average base period net income for 1945, both in connection with the computation of the unused excess profits credit carry-back from 1945 to 1944. The facts were all stipulated, and in the stipulation respondent conceded the use of a constructive average base period net income for 1943 in arriving at the said carry-back.

The sole issue which remained to be decided by the Tax Court was whether there was a timely application for relief for 1944 effective to allow use of a constructive average base period net income for 1945 in computing the carry-back to 1944 of the unused excess profits credit for 1945. It is petitioner's contention that the original application for relief filed for 1944 was sufficient to encompass use of section 722 in determining the excess profits credit of any year involved in computing the excess profits tax for 1944. Such years necessarily included 1943 and 1945, involved by way of the carry-back from 1945 to 1944. The Commissioner conceded this as to 1943, in computing the carry-back from 1945 to 1944, but denied it as to 1945, in computing the very same carry-back. Even if the original application for relief for 1944 was not broad enough to accomplish this, petitioner contends that a letter written by it in May, 1951, addressed to the division of the office of the Commissioner then considering the matter, was sufficient for this purpose.

III.

The petitioner being aggrieved by the conclusions

of law contained in the findings and opinion of the Tax Court, and by its decision entered herein, desires to obtain a review thereof by the United States Court of Appeals for the Ninth Circuit.

/s/ GEORGE T. ALTMAN,
Attorney for Petitioner on
Review.

Filed October 19, 1956, T. C. U. S.

[Title of Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To: John Potts Barnes, Chief Counsel, Internal
Revenue Service.

You are hereby notified that I, George T. Altman, did, on the 19th day of October, 1956, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit, of the decision of The Tax Court heretofore rendered in the above-entitled cause. Copy of the petition for review as filed is hereto attached and served upon you.

Dated this 16th day of October, 1956.

/s/ GEORGE T. ALTMAN,
Attorney for Petitioner on
Review.

Service of copy acknowledged.

Received and Filed October 19, 1956, T.C.U.S.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 23, inclusive, constitute and are all of the original papers on file in my office as called for by the "Designation of Contents of Record," including joint exhibits 1-A through 13-M, attached to Stipulation of Facts, in the case before the Tax Court of the United States docketed at the above number and in which the petitioner in the Tax Court case has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court case, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States at Washington, in the District of Columbia, this 9th day of November, 1956.

[Seal] /s/ HOWARD P. LOCKE,
 Clerk, Tax Court of the
 United States.

[Endorsed]: No. 15369. United States Court of Appeals for the Ninth Circuit. Utility Appliance Corporation, a Corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of the Tax Court of the United States.

Filed November 23, 1956.

Docketed November 27, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15369

UTILITY APPLIANCE CORPORATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

STATEMENT OF POINTS ON WHICH
PETITIONER INTENDS TO RELY

The points on which petitioner intends to rely on this appeal are as follows:

1. Section 322(b)(6) of I.R.C. 1939 is a remedial provision and does not reduce the period allowed under section 322(b)(1).

2. Petitioner filed the form required by the regulations for the purpose of using a CABPNI (constructive average base period net income) for 1945 in computing the unused excess profits credit carry-back allowed from 1945.

3. The form required by the regulations required no special or express statement in the case of an unused excess profits credit carry-back.

4. Petitioner submitted all of the information required by the regulations for the purpose of using a CABPNI for 1945 in computing the unused excess profits credit carry-back allowed from 1945.

5. Petitioner made the claim of benefit of the unused excess profits credit carry-back required by the regulations.

6. Even if the original claim filed was defective because it did not expressly request that a CABPNI for 1945 be used in the computation of the unused excess profits carry-back allowed from 1945, such defect was cured by petitioner's amendatory letter dated May 7, 1951, to the Excess Profits Tax Council, the division of the Commissioner's office before which the claim was then pending, followed by consideration of the claim on the merits by the Commissioner.

7. A letter acknowledged and acted upon is adequate as an informal claim or amendment of a claim.

8. An amendment of a claim did not present a new ground where, as here, it did not require the Commissioner to make a new and different inquiry from that which he was called upon to make under the original claim.

Respectfully submitted,

GEORGE T. ALTMAN,
Counsel for Petitioner.

[Endorsed]: Filed November 29, 1956, U.S.C.A.

